Filed 4/27/12 P. v. Barber CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOVAN DEONTE BARBER, Defendant and Appellant.	G044544 (Super. Ct. No. 08WF0314) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Law Offices of Wilma R. Shanks and Wilma R. Shanks for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jovan Deonte Barber of attempted murder, assault with a semiautomatic firearm, possession of a loaded firearm in public by an active gang participant, active participation in a criminal street gang, and found true the gang, firearm use, and great bodily injury enhancements. He contends the evidence does not support the jury's verdicts and the court erred in admitting evidence. We affirm.

I

FACTS

Defendant was charged in the information with the deliberate and premeditated attempted murder of Sean Carter (Pen. Code,[1] §§ 664, subd. (a), 187, subd. (a); count one), robbery (§ 211; count two), conspiracy to commit robbery (§§ 182, subd. (a), 211; count three), assault with a semiautomatic firearm (§ 245, subd. (b); count four), possession of a loaded firearm in public by an active participant in a criminal street gang (§ 12031, subds. (a)(1), (a)(2)(C); count five), and active participation in a criminal street gang (§ 186.22, subd. (a); count six), all alleged to have occurred on February 19, 2004. Additionally, defendant was alleged to have personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)) in the commission of the offenses charged in counts one, two, and three, personally used a firearm (§ 12022.5, subd. (a)) in count four, personally inflicted great bodily injury (§ 12022.7, subd. (a)) in counts one through four, and to have committed the offenses charged in counts one through five for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

Robert Jones had been charged with attempted murder, robbery, and conspiracy to commit robbery in connection with this case. He pled guilty to attempted murder and agreed to testify in exchange for a five-year prison sentence.

[1] All statutory references are to the Penal Code unless otherwise stated.

Jones met defendant in 2003, in the Long Beach apartment complex of Tynisha Jackson, a woman Jones stayed with a few times a week. Jones and defendant both sold marijuana. Jones, who was not a member of a criminal street gang, said defendant was a member of the "Rolling 20's Crips" gang. Jones is aware of tattoos worn by members of that gang. They include the Pittsburgh Steelers emblem, a tattoo defendant had on his neck prior to February 19, 2004. Defendant told Jones "what the tattoo was about." Jones said the gang's colors are black and gold, and he has seen defendant wear the gang's colors.

During a police interrogation, Jones said he had been approached in the end of 2003 by an associate of defendant's, Robert Williams, an active member of the Rolling 20's Crips. Williams attempted to recruit Jones to sell marijuana for the gang. Defendant also asked Jones to "turn 20" and sell marijuana under the veil of the gang.

In early February 2004, Jones attended a Bob Marley festival. He was selling marijuana at the time and knew there would be people there with marijuana. Jones was looking to buy marijuana to then sell. He met the victim, Sean Carter, at the festival. Carter claimed to have a rare, expensive and highly potent marijuana, "cush," he could sell to Jones. Carter gave Jones his telephone number.

Jones told defendant about Carter and they agreed to buy marijuana from Carter. Jones called Carter to arrange a purchase of four ounces to test the "cush." A second sale was negotiated to take place on February 19, 2004. Because this sale was for a pound of marijuana, Carter wanted it to take place closer to his residence, so a meeting in Huntington Beach was agreed upon.

They met at an Arco gas station. Jones and defendant arrived in defendant's Chevrolet Tahoe (SUV) with black spinner rims. Jones saw the red car he was told to look for. Jones got out and approached Carter. It appeared to Jones as if Carter had a number of people with him. Jones and Carter patted each other down for weapons. Jones showed his half of the money and said his partner had the other half

inside their vehicle. Jones told Carter that if he was afraid to do the exchange in the SUV, he could pull his car to the front of the SUV and block it in.

Jones said Carter got into the front passenger seat of the SUV carrying a black duffel bag. Jones got into the driver's seat. Defendant was now in the backseat. Jones and defendant wanted to weigh the marijuana. Carter wanted to make sure they would buy the marijuana before he opened the vacuum sealed bag containing the product. Defendant and Jones had a digital scale with them. The marijuana was placed on the scale. It read 28 grams, but Jones testified it should have weighed 29 grams, considering the presence of the plastic baggies.[2] There was a discussion between the three about the weight. Defendant said he did not want his share because it was light, Carter said he did not want to deal with Jones and defendant, and got out of the vehicle. Jones, not wanting to "mess[] up a good connect," talked Carter into returning to the vehicle.

Back inside, defendant pushed his half of the marijuana to Carter and said he wanted his money back. Carter said a deal is a deal. When Carter again went to leave, Jones dove for the bag. Carter did too. Jones called out that Carter was going for a knife.[3] Jones said the knife was in the bag, unopened. Believing Carter was reaching for the knife, Jones backed off. Defendant then shot Carter in the back with his .25-caliber semiautomatic handgun. Jones testified he did not know defendant was armed. Jones then drove away and had defendant drop him off at his car.

Carter testified pursuant to a grant of immunity. He has a prior conviction for selling marijuana. Carter said he met Jones, who said his nickname was "Slim," at a Bob Marley concert about a week prior to the shooting. Jones asked Carter if he wanted

[2] The vacuum sealed bag contained 16 sandwich bags of marijuana.

[3] Jones said Carter had used a switchblade knife to open the vacuum sealed bag.

to buy any marijuana and Carter said no, because he sells too. Carter gave his telephone number to Jones.

Jones subsequently contacted Carter about buying three pounds of marijuana and said they could both make some money. Carter said he only had one pound on hand. Carter and Jones agreed to arrange the sale. Originally, they were to meet in the parking lot of a mall, but Jones did not show up at the appointed time. Carter called Jones and asked where he was. Jones said it was taking longer than expected. Carter felt something was wrong and called the deal off.

The two spoke on the telephone again while Carter was on his way home. Jones said he had people counting on him. Carter, feeling Jones sincerely wanted the deal to go through, agreed to meet Jones at a gas station by a particular intersection in Huntington Beach. Jones said he would be in a tan SUV with black spinners. Carter showed up at the gas station with three friends. A vehicle matching Jones's description pulled into the gas station. Carter said he saw only one person in the vehicle.

Carter and Jones patted each other down. Carter said Jones was "acting weird," nervous and wanted to do the transaction in the SUV. One of Carter's friends then parked the red vehicle in front of the SUV, which was backed into a parking space. Carter, with the marijuana in a K-Swiss shoe box, got into the front passenger seat of the SUV. Jones got into the driver's seat. Carter did not see anyone else in the vehicle. Carter said he wanted to see Jones's money. The money was wrapped in green Saran wrap. Carter wanted to count it. The shoe box was on the floor in front of Carter so his hands would be free. At that point Jones asked Carter if he saw Jones's cell phone. When Carter looked to the floor, Jones tried to grab the marijuana. Jones then said something like, "pop up," or "now," and someone in area behind the backseat of the vehicle pointed a gun at Carter.

Carter did not see the person's face and could not identify the person or his race. Jones said, "shoot him." Carter said, "No," and let go of the shoe box. He opened

the door of the vehicle and stepped out, leaving the marijuana in the vehicle. The person in the back of the vehicle shot Carter in the back. Carter made it back to his friends and went to the hospital where he remained for a week.

Detective Mark Sisneros of the Long Beach Police Department testified as a gang expert. He is familiar with the Rolling 20's Crips, a violent street gang, and has had contact with over 400 of the gang's members. In February 2004, the gang was one of Long Beach's largest and had 450 to 500 members. The gang's colors are black and gold and their sports team is the Pittsburgh Steelers whose colors are also black and gold.

The gang's primary activities include murder, robbery, and drug sales. Sisneros knows defendant. He said defendant has "T.C." tattoed on his upper cheek. T.C. stands for "Twenty Crips." Defendant also has a "D.C.," "20," and a Steeler's tattoo on his body. D.C. stands for "Duece Crip," 20 stands for "Rolling 20," and the Steelers emblem is a common tattoo among members of the Rolling 20's Crips. Rivals of Rolling 20's Crips would know just by looking at defendant and his tattoos that he is a member. Sisneros said defendant's tattoos place him in danger.

Sisneros discussed defendant's police contacts. In 2001, there was a gang shooting and defendant was contacted at a residence where a gun was located. There were a number Rolling 20's Crips present, including Williams, an admitted member. On another occasion, defendant was in a vehicle in which a gun was found. Defendant claimed membership in the "East Coast Crips" at that time. In 2005, defendant was contacted in a vehicle with other members of the Rolling 20's Crips, including Williams. They were coming from the funeral of another member of the gang. Police found two handguns in the vehicle. During that incident defendant admitted he was a member of Rolling 20's Crips.

Sisneros also considered a police report in the instant case. It contained an interview with Jones. Jones said defendant told him Williams directed defendant to sell drugs for the Rolling 20's Crips. When Jones asked defendant if he was a member of the

gang, defendant laughed, but then returned wearing a yellow rag, something Rolling 20's Crips members commonly wear. Sisneros opined defendant was an active participant in the Rolling 20's Crips in February 2004.

The prosecutor gave Sisneros a hypothetical factual situation mirroring the facts of the present case and asked Sisneros if he had an opinion about whether the crime was committed for the benefit of a criminal street gang. Sisneros said the crime benefitted the gang and was committed to further or promote the conduct of the gang because the marijuana goes back to the gang and the gang benefits from the presence of the marijuana, which is then sold or used by other members of the gang.

The jury found defendant guilty of attempted murder,[4] assault with a semiautomatic firearm, possession of a loaded firearm in public by an active gang participant, active participation in a criminal street gang, and acquitted him of the robbery and conspiracy charges. The jury found the enhancements attached to the charges resulting in convictions true. The court denied defendant's motion for a new trial and sentenced defendant to an aggregate term of 44 years to life, consisting of the upper term of nine years for attempted murder and consecutive terms of 25 years to life for the personal discharge of a firearm enhancement (§ 12022.53, subd. (d)), and 10 years for the gang enhancement (§ 186.22, subd. (b)(1)) attached to the attempted murder charge. The sentences on the remaining counts were stayed pursuant to section 654.

II

DISCUSSION

Defendant contends the trial court erred in denying his motion for a new trial and renews on appeal many of the arguments he made in his new trial motion. He argues on appeal the evidence does not support the conviction for attempted murder because credible evidence of his identity as the shooter is lacking. Along the same lines,

[4] The jury did not find the attempted murder was deliberate and premeditated.

he asserts the gang enhancement is not supported by the evidence because the gang expert's testimony was not credible. He claims gang evidence was irrelevant, should not have been admitted, and its erroneous admission was prejudicial. Lastly, he also alleges the trial court erred in admitting evidence of a letter written to him and a letter he wrote while he was in jail.

A. *Admission of Gang Evidence*

All the charges in this case arose from defendant's actions during a drug transaction on February 19, 2004. Defendant argues the trial court erred in admitting gang evidence because the evidence had minimal probative value and the charged crimes were not gang related. "In cases *not* involving the gang enhancement, . . . evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Here, on the other hand, defendant was not only charged with actively participating in a criminal street gang on the same date as the other charges, the information alleged the attempted murder, robbery, and conspiracy to commit robbery were committed for the benefit of a criminal street gang with the specific intent to promote or further the gang. (See § 186.22, subd. (b)(1).)

"To establish a gang enhancement, a prosecutor must prove facts beyond the elements of the underlying offense. [Citation.] 'Accordingly, when the prosecution charges the criminal street gang enhancement, it will often present evidence that would be inadmissible in a trial limited to the charged offense.' [Citation.] To prove the gang enhancement, the prosecution may introduce expert testimony regarding street gangs. [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 820.) Thus, the inherent inference of prejudice arising from the admission of gang evidence as a general type of evidence is dispelled. (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1049-1050.)

Needless to say, this does not mean any and all gang evidence is admissible simply because a gang enhancement has been alleged. The evidence still must be relevant (Evid. Code, § 350) and not unduly prejudicial (Evid. Code, § 352). Gang evidence was properly admitted in this matter. Defendant, a member of the Rolling 20's Crips, sold marijuana for the gang. He knew Jones also sold marijuana and attempted to get Jones to sell for his gang. Jones and defendant agreed to obtain a pound of marijuana from Carter and split the marijuana between them. It was reasonable to infer from this evidence that defendant would sell his half a pound of marijuana for the gang. The gang evidence admitted in this case was relevant to prove the substantive gang crime (§ 186.22, subd. (a)) as well as the gang enhancement.

Moreover, defendant did not demonstrate any prejudice flowing from the admission of the gang expert's testimony. We also note the jury acquitted defendant of robbery, attempted robbery as a lesser included offense, and conspiracy to commit robbery notwithstanding the introduction of gang evidence. Accordingly, we conclude the trial court did not err in admitting gang evidence and admission of the evidence did not affect defendant's right to a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

B. *The Letters*

Defendant contends the trial court committed prejudicial error in its evidentiary rulings involving two letters. The first involved a letter from Theodore Duverney to defendant.

Duverney had been defendant's cellmate at one point while defendant was in custody on this matter. Defendant said he was accused of shooting someone. Duverney learned the alleged victim, Carter, was someone he knew from high school. Duverney contacted Carter after getting out of custody and then wrote to Carter. The

letter stated, "Slim is all anybody's got out here."[5] Duverney said Slim was the person defendant said was involved in the incident and accusing him. The line "Nobody is on the run or on probation period. So know that ain't a factor," was in response to defendant's question of Duverney about whether Carter was "on the run." Duverney wanted defendant to know Carter said he was not on probation. "Slim is gonna get washed unless he does what you think he's gonna do," conveyed Duverney's opinion that Jones would get convicted.

On cross-examination, Duverney said defendant did not ask him to contact Carter. He said he only wrote to defendant to lift defendant's spirits because inmates look forward to receiving mail.

"Trial court rulings on the admissibility of evidence are reviewed for abuse of discretion. [Citation.]" (*People v. Elliott* (2012) 53 Cal.4th 535, 577.) An erroneous admission of evidence, however, does not require reversal unless the admission resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

Throughout the more than four pages addressing this issue in his opening brief, defendant does not cite any authority – statutory or case law – for the proposition that the evidence was inadmissible.[6] Defendant argues the letter contained hearsay, but

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[5] Slim was the name by which Carter knew Jones.

[6] Defendant's four-page statement of facts contained a single citation to the record and that was made in the middle of the four pages. We denied respondent's motion to strike defendant's Opening Brief for failure to cite to the record, however, counsel is directed to California Rules of Court, rule 8.204(a)(1)(C). The failure to cite to the record makes our job unduly burdensome. An appellate court is "not required to search the record to ascertain whether it contains support for [a party's] contentions [on appeal]." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) Moreover, such action runs the very real risk of forfeiting issues. When the record is not cited and an argument lacks citation to authorities, an appellate court may treat the issue as abandoned or forfeited, and pass it without considering the argument because it is not the reviewing court's responsibility to develop an argument for a party. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007.)

admits no hearsay objection was made below. Because defendant did not make a hearsay objection in the trial court, the issue has not been preserved for appeal. (*People v. Williams* (1997) 16 Cal.4th 635, 681.)

However, even were we to find the court erred in admitting Duverney's testimony of the content of the letter, reversal would not be required. Duverney testified he was defendant's cellmate for a couple of months and came to know defendant was accused with shooting the alleged victim, Carter, who Duverney went to high school with and knew as Sean Leeson. When Duverney got out of custody, he called Carter after he ran into Carter's brother at a high school graduation and was given Carter's telephone number.

Duverney testified contacting Carter was not defendant's idea. Duverney said he contacted Carter on his own. He made no effort to get hold of Carter other than asking Carter's brother for the number when he unexpectedly ran into the brother at the graduation. Duverney said he called Carter to let Carter know he had been locked up with the person who was accused of shooting Carter. Additionally, Carter testified Duverney did not attempt to dissuade him from testifying or persuade him how to testify. As a result, we conclude the evidence was not prejudicial, even if erroneously admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

The second letter was defendant's letter to his girlfriend. The relevant portion of defendant's letter stated, "I like that this case is all f . . . d up bad. I just walk into the courtroom smiling now because I know I am home free. LOL. The case is too old to find anything or anybody *that they really need*." (Italics added.) Defendant argues the prosecution failed to lay a proper foundation that he wrote the letter, the letter was inadmissible hearsay, and was too prejudicial to be admitted.

Sergeant Michael Schultz of the Orange County Sheriff's Office worked in the men's jail in July 2008. He supervises six full-time mail room employees who process inmate mail. Schultz said a mail cover is a request by a law enforcement agency

to photocopy all incoming and outgoing mail of an inmate. Defendant had a mail cover on his mail in July 2008. Schultz explained the procedure used in collecting outgoing mail from inmates, checking for contraband, and mailing the letters. When an inmate has a mail cover, three employees familiar with the names of inmates having mail covers go through that day's outgoing mail and retain mail from those inmates. Those letters are then photocopied and initialed. The original is mailed.

Subject to the mail cover, an outgoing letter purportedly from defendant and bearing his booking number was photocopied and stamped with "Orange County Jail Inmate Correspondence." The letter was date stamped and bears the initials J.M. Schultz recognized the stamp as one used in the jail's mail room. He also recognized the initials.

Defendant objected at trial, arguing a proper foundation was missing in that while Schultz testified about the procedure used when a mail cover exists, testimony from the person who actually processed the letter was required. The court overruled the objection. Defendant makes the same argument here.

The letter was inadmissible absent its authenticity being established. (Evid. Code, § 403, subd. (a)(3).) Authenticity need only be established by a preponderance of the evidence. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61; Evid. Code, § 115.) A trial court has broad discretion in determining whether a sufficient foundation has been laid and "we will reverse a trial court's ruling on such a foundational question only if the court clearly abused its discretion. [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1011, fn. omitted.)

Defendant was in custody at the time the letter was mailed. It bore defendant's booking number and was addressed to his girlfriend at the time, Ebony Barber. Based on these facts we cannot find the trial court abused its discretion in admitting the letter into evidence.

The letter was not inadmissible hearsay. It was statement of a party to the action. "Evidence of a statement is not made inadmissible by the hearsay rule when

offered against the declarant in an action to which he is a party . . . ." (Evid. Code, §1220.) Not every statement of a party is admissible under Evidence Code section 1220. Ordinarily, a defendant's statement admitted under Evidence Code section 1220 is offered to prove the truth of the matter asserted: for example, a defendant's confession that he committed the charged offense. However, when the statement is offered for a purpose other than as proof of the matter asserted, "'its admissibility must be based on the circumstantial-evidence-reasoning process. In such a case, the test of relevancy must be satisfied.' [Citation.]" (*People v. Morgan* (1978) 87 Cal.App.3d 59, 68, overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 496 & fn. 12.)

That test is satisfied here. The letter contained the following sentence: "The case is too old to find anything or anybody *that they really need*." (Italics added.) Contrary to defendant's characterization of the evidence as merely expressing a hope "that the case will go away due to lack of prosecution," the jury was entitled to reasonably conclude the statement indicates defendant's belief that the evidence needed to convict him is unavailable only because the case is too old. This indicates a consciousness of guilt, albeit an optimistically sunny one.

Neither did Evidence Code section 352 require exclusion of this evidence. An appellate court will not disturb a trial court's exercise of discretion under Evidence Code section 352 unless the relevance of the evidence is clearly outweighed by its prejudicial effect. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) Defendant has failed to articulate any prejudicial effect.

C. *Sufficiency of the Evidence*

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Steele*

(2002) 27 Cal.4th 1230, 1249.) We must accept all assessments of credibility made by the trier of fact, then determine if substantial evidence exists to support each element of the offense. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 387.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

1. *Attempted Murder*

Defendant contends the evidence does not support the attempted murder conviction. He does not argue the evidence is lacking with regard to the intent with which Carter was shot. Rather, defendant urges the evidence of his identity as the shooter was not substantial because Carter, the victim of the shooting, did not identify him and Jones's identification was untrustworthy. He maintains Jones's testimony was untrustworthy because Jones received a favorable plea bargain for his part in the incident in exchange for his testimony. He cites no authority for the proposition that testifying in exchange for a favorable plea bargain renders the testimony unreliable. Indeed the Supreme Court has flatly rejected the idea. (*People v. Andrews* (1989) 49 Cal.3d 200, 231.)

Defendant also maintains Jones's testimony was unreliable because it was contradicted by Carter's testimony, which, defendant claims, was more credible. First, it must be remembered it is the jury – not this court and not defense counsel – who decides the credibility of the witnesses. (*People v. Elliott*, *supra*, 53 Cal.4th at p. 585.) The jury apparently accepted Jones's testimony. Second, witnesses will often view an event differently. That common occurrence does not necessarily mean one of the two was not credible. And even if it did, it is the jury who decides which of the two versions, if either, is credible. "'[I]t is the exclusive province of the . . . jury to determine the

credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Ibid*.) The events to which Jones testified were not physically impossible or inherently improbable. He testified defendant shot Carter in the back during the marijuana transaction. We conclude substantial evidence supports defendant's conviction for attempted murder.

2. *The Gang Enhancement*

For a section 186.22, subdivision (b)(1) gang enhancement to apply, "the offense of which the defendant is convicted in the present case must have been 'committed for the benefit of, at the direction of, or in association with any criminal street gang' and the defendant must have committed the offense with 'the specific intent to promote, further, or assist in any criminal conduct' by members of the street gang. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 615-616, italics omitted.) It is not whether the defendant committed some other criminal act to benefit the gang, but whether "the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.]" (*Id*. at pp. 616-617.)

Defendant contends the gang enhancement attached to the attempted murder count is not supported by substantial evidence, and again argues the evidence is lacking because a witness was not credible. This time he argues it was the gang expert who was not credible. As stated above, however, the jury decides the credibility of witnesses, not this court. (*People v. Elliott, supra*, 53 Cal.4th at p. 585.)

Defendant attempts to make much of the fact that defendant's membership in the gang was disputed. The real dispute was over when defendant became a member. The charged incident occurred in 2004. There was a question as to when he acquired

certain gang tattoos; whether he obtained them and arguably became a member of Rolling 20's Crips *after* the charged incident. Jones testified defendant was a member of the gang in February 2004. However, gang membership is not an element of a gang enhancement. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505.)

The gang expert opined the crime was committed for the benefit of the gang and was committed to further or promote the conduct of the gang. The gang sells marijuana and kills people. Defendant, an active participant in the gang, sold marijuana for the gang, attempted to recruit Jones to sell marijuana for the gang, and obtained an amount of marijuana from Carter indicating it would in turn be sold. And, defendant shot the seller in the back. The gang expert said the gang would benefit from the crime because the marijuana would go back to the gang and be sold and/or used by the gang. He also testified the gang's reputation would be increased by the crime because people would know the gang committed a crime outside of Long Beach.

The fact that no gang signs were thrown at the time of the crime, or that the gang's name was not called out – while each may evidence a gang motive for the crime (see *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109-110 [throwing gang signs to pedestrians during car chase sufficient to support gang enhancement]) – does not mean the crime was *not* intended to benefit the gang. Although there is no evidence the victim (or those with him when he was shot) knew defendant was a member of the Rolling 20's Crips, as evidenced by the fact defendant did not announce his gang affiliation and consequently those individuals would not be likely candidates to spread the word, Jones was present. He knew the crime was committed by a member of the gang. Accordingly, we conclude ample supports the gang enhancement.

D. *The New Trial Motion*

We review the trial court's order denying a motion for a new trial for an abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) """A trial court's

ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."' [Citations.]" (*Ibid*.) As defendant's new trial motion was based on his arguments above, and we resolved those issues in favor of the judgment, *ante*, he has failed to demonstrate his motion for a new trial had merit and that the trial court abused its discretion in denying the motion.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.